

R.D. # 0006-06
Edison, NJ

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22**

CASWELL-MASSEY CO., LTD¹
Employer

and

CASE 22-RC-12693

**UNITED STEELWORKERS, AFL-CIO,
UNITED STEEL, PAPER AND FORESTRY,
RUBBER, MANUFACTURING, ENERGY,
ALLIED INDUSTRIAL AND SERVICE
WORKERS INTERNATIONAL UNION²**
Petitioner

DECISION AND DIRECTION OF ELECTION

I. INTRODUCTION

The Petitioner seeks to represent a unit of approximately 20³ employees consisting of all full-time and part-time warehouse employees employed by the Employer at its Edison, New Jersey facility. The Employer contends that the unit should be a wall to wall unit of employees employed at its Edison facility and two retail stores, one located at the Short Hills Mall in Short Hills, New Jersey, approximately 15-20 miles from the Edison location and one located at 518 Lexington Avenue, New York City, approximately 20-25 miles from the Edison location and 15-

¹ The name of the Employer appears as amended at hearing.

² The name of the Petitioner appears as amended at hearing.

³ The Petitioner's unit consists of 17 warehouse employees and 3 employees designated as supervisors but who the Employer and Petitioner stipulate and agree are not statutory supervisors and are properly included in the unit. The three employees are: Snezana Cuetkovic; Lloyd Sukhu and Carmen Thomas.

20 miles from the Short Hills Mall. The Employer's proposed unit would include the following titles: customer service representative; customer service specialist; data entry; junior accountant; picker; packer; credit and collection; catalogue and internet, marketing; hi-lo driver; maintenance employee; floor person; and sales associate.

Based on the following facts and analysis, I find appropriate a single facility unit of approximately 20 warehouse employees, including the three employees designated as supervisors but stipulated to lack the requisite supervisory indicia. I further find that the clerical employees employed at the Employer's Edison facility do not share a sufficient community of interest with the warehouse employees to require their inclusion in the unit found appropriate.

Upon the entire record in this proceeding,⁴ the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the act and it will effectuate the purposes of the Act to assert jurisdiction herein⁵
3. The labor organization involved claims to represent certain employees of the Employer.⁶

⁴ Briefs filed by the parties have been duly considered.

⁵ The Employer sells personal care and related products, such as soaps, lotions and gels, through its direct marketing division by internet catalogue. Customers are contacted by catalogue and e-mail and their orders are accepted by internet, phone, fax and mail. Orders are then entered into the system for processing, picking and packing through the warehouse located in Edison, New Jersey. The Employer also maintains a wholesale business of approximately 2000 accounts through which it sells to retailers. In addition, the Employer maintains 12 retail stores through which it sells product: Lexington Avenue in New York City; the Short Hills Mall in New Jersey; Georgetown near Washington, D.C.; Charlotte, North Carolina; Atlanta, Georgia., Tampa and West Palm Beach, Florida; Pittsburgh, Pennsylvania., Plano, Texas; Vail, Colorado; San Francisco and Newport Beach, California.

⁶ The parties stipulated and I find that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c) (1) and (7) of the Act.⁷

5. The appropriate unit for the purpose of collective bargaining within the meaning of Section 9(c) of the Act is as follows:

All full-time and regular part-time warehouse employees employed by the Employer at its Edison, New Jersey facility, excluding all office clerical employees, professional employees, guards and supervisors as defined by the Act, and all other employees.

II. FACTS

The Employer has approximately 120 employees throughout the United States of whom 47-48 are located at the Edison, New Jersey location which houses its administrative and warehousing facilities. The Employer is not a product manufacturer but rather assembles and packs items that come into its warehouse cellophane-wrapped and ready. There are 22 employees working in the warehouse section, two statutory supervisors and 20 unit employees. The other 25-26 Edison employees are located in its office area, including administrative and clerical personnel. The remainder of the 120 employees are located in retail stores across the country.

The stores order their merchandise through the distribution center in Edison to be sold at the retail sites. The Employer claims that the warehouse is merely an extension of the store as a customer may see a product advertised or displayed which

⁷ There is no bargaining history and no contract bar for the employees sought herein.

the store does not have in stock. The product can then be ordered from the warehouse and provided to the store customer.

As noted, orders come in from several different sources. A customer may respond to a catalogue or e-mail solicitation by telephoning, faxing, e-mailing or posting an order. Those orders go to the mail order management center. Faxed or mailed-in orders are logged in. Phone or e-mail orders are downloaded into the system several times per day. Once the order is in the system it goes to processing. Processing verifies the on-hand inventory and prints a pick ticket. The pick ticket is accompanied by a bill of lading, an order and a shipping label, all of which goes to the warehouse. The foregoing functions are handled by clerical employees.

In the warehouse the orders are sorted and prioritized with next day items filled first because customers are paying a premium for them. The order then advances to be picked and packed. Warehouse employees pick the merchandise and send it on for packing and shipping from the warehouse. Each order is individually packed and labeled and placed on a pallet to be sent either by United Parcel Service (UPS) or the US Postal Service (Mail). Wholesale orders are handled the same way as mail orders. Wholesale clerical personnel visit the warehouse at least once per day to deliver orders. There are seasonal order increases, such as Christmas or Mother's Day, which may require increased contact between the clerical and warehouse personnel. The nature of this contact is unclear.

Returned items are handled in a similar way. They come in through UPS or mail and are processed by clerical personnel who also deal with customer complaints, order tracking and damaged shipments. Postal returns are delivered to the front door

and are kept in the reception area. The warehouse is notified of the returns and a warehouse worker will collect them from reception and return them to the warehouse where it is determined if the products should go back into stock, be destroyed, or be included in a warehouse sale.⁸ If warehouse employees are not able to determine what to do with the product, it is given to customer service representatives to handle. The Employer noted that in addition to the specified periods of the year during which the clerical staff and warehouse staff worked directly together, they also have regular contact during the course of a work week in that the purchasing department “talks” to the warehouse every day; accounts payable talks to the warehouse regularly, although regularly was not defined; accounts receivable will have contact with the warehouse several times a week and there will be contact with warehouse personnel regarding returned orders perhaps on a weekly basis. However, the record is silent as to whether direct or telephone contact is with the warehouse supervisors or unit employees. There is scant evidence of contact between the two stores and the warehouse employees as sales people from the Short Hills and Lexington Avenue stores visit the warehouse rarely.

The Employer emphasizes that the employees it seeks to include in the unit all share the same benefits. All are covered by the same personnel manual, the same health plan and the same 401k plan; sick leave is the same, vacation time is awarded

⁸ Warehouse sales are generally held 5 times per year to reduce excess merchandise. During these sales the warehouse is temporarily open to the public. During the course of a warehouse sale, lasting for 2-3 days, both warehouse and clerical personnel participate. While warehouse personnel “might” make a direct sale to a customer, they are more often bagging merchandise or directing traffic in the parking lot.

Clerical and warehouse employees also work side by side for discrete periods of time on other occasions. They do physical inventory of the warehouse once each year for a period of 3-4 days and they work together for a peak assembly period during the Christmas holiday season for four days and just prior to Mother’s Day for several days.

based on length of service and all employees are paid for overtime. Employee grievances, or “concerns” as the Employer denotes them, are first brought to the employee’s direct supervisor and, if not dealt with satisfactorily, only then advance to the Company President. The record is silent as to how many “concerns” have been dealt with by the company President. However, the record also reveals significant differences between the warehouse, clerical and retail store personnel. The warehouse employees work in a discrete location, separated by a wall from other employees and have separate supervision. The clerical employees are salaried employees, although their salaries are converted to hourly wages for purposes of overtime payment, while the warehouse employees are hourly. Warehouse employees work from 7:30 am to 4:30 pm, clerical employees work from 8:30 am to 5:30 pm. The record is silent as to the hours of work at the retail stores. In fact, there is almost no record evidence regarding the working conditions of retail store employees. The clerical employees sign in; the warehouse employees punch a clock. Clerical employees are required to have a high school diploma. There is no such requirement for warehouse employees, although those who drive hi-los and fork lifts have to be duly licensed. Clerical employees have staggered lunch breaks between the hours of 11:30 am – 2:00 pm. Warehouse employees have lunch at 12:30 pm and their lunch and break room is separate from that of clerical employees. A review of the salary chart contained in the record shows that the highest warehouse pay rate is approximately that of the lowest clerical pay rate. Although there are a few examples of employees moving from one area to another, there is no indication that there is widespread ability to do so, as a high school diploma may be an impediment to

significant movement from the warehouse to clerical titles. There is no job-bidding procedure and warehouse employees are cross-trained only in warehouse functions.

III. ANALYSIS AND CONCLUSION

1. The Warehouse Employees Are An Appropriate Unit

In making a determination as to whether a petitioned for unit is appropriate, the Board has held that Section 9(a) of the Act only requires that the unit sought by the petitioning union be an appropriate unit for purposes of collective bargaining. Nothing in the statute requires that the unit be the only appropriate unit or the most appropriate unit. *Morand Brothers Beverage Co.*, 91 NLRB 409, 418 (1950); *National Cash Register Co.*, 166 NLRB 173, 174 (1966).

Although the unit sought by a petitioning labor organization is a relevant consideration in determining the scope of a bargaining unit, a union is not required to seek representation in the most comprehensive grouping of employees unless an appropriate unit compatible to the unit requested does not exist. *Overnite Transportation Company*, 322 NLRB 732 (1996); *Dezcon, Inc.*, 295 NLRB 109, 111 (1989). An employer may seek a broader unit and that unit may be appropriate but it does not necessarily render the petitioner's unit inappropriate. *Overnite Transportation Co.*, above. Here, an issue is whether the clericals the Employer seeks to include with the petitioned for warehouse employees are plant clerical employees or office clerical employees.

It should be noted that the Board customarily excludes office clerical employees from production and maintenance and/or warehouse employee units, while plant clericals are generally included in such units. *Hygeia Coco-Cola Bottling Co.*, 192

NLRB 1127. (1971); *Westinghouse Electric Corp.*, 118 NLRB 1043 (1957); *Raytee Co.*, 228 NLRB 646 (1977). The distinction between office clerical and plant clericals, however, is not always a clear one because the disputed employees often appear to share characteristics of both groups in the duties they perform and in their working conditions. A controlling factor in making this distinction is whether the disputed clericals perform work that is directly related to, and integrated with, the functional operation of the facility and the duties performed by other unit employees. *Ives Business Forms*, 263 NLRB 286, 289 (1982). In making this determination, the Board looks at factors such as whether the clericals have regular contact with unit employees; work in an area adjacent to unit employees; and share common wages, immediate supervision, working conditions and fringe benefits with unit employees. *American Parts Systems, Inc.*, 254 NLRB 901, 902 (1981). If such factors are present, the clericals are considered to be plant clericals. *Jacob Ash Co.*, 224 NLRB 74, 75 (1976). If, however, the disputed employees are separately supervised; physically separated; have minimal contact with unit employees and limited transfer or interchange with unit employees, the clerical employees are found to be office clericals and excluded from the unit. *Ives Business Forms, Inc.*, above.

The Employer asserts that the clerical employees share a community of interest with the warehouse employees sought by Petitioner and should be included in the unit but provides scant evidence to support this contention. As noted above, the warehouse employees and clerical employees occupy separate portions of the facility and have separate immediate supervision. The warehouse employees have limited contact with the clerical employees and very limited interchange as warehouse

employees do not necessarily have the qualification of clerical employees, i.e., a high school diploma, and have only been cross-trained in warehouse functions. They have significantly different working conditions in terms of pay, hours of work, areas for break and lunch and attendance documentation. Based on these distinct differences, I find that the clerical employees are office clericals and as such do not share a community of interest with the warehouse employees. Therefore, the office clerical employees will be excluded from the appropriate unit.

2. Single vs. Multi-Location Unit

The Petitioner seeks a unit composed only of warehouse employees at the Edison facility. The Board has long held that a single location unit is presumptively appropriate for collective bargaining. *J&L Plate*, 310 NLRB 429 (1993); *Bowie Hall Trucking*, 290 NLRB 41 (1988). The presumption in favor of a single location unit can only be overcome “by a sharing of functional integration so substantial as to negate the separate identity of a single facility unit.” *Id.*, *Courier Dispatch Group, Inc.*, 311 NLRB 728 (1993); *Dixie Belle Mills*, 139 NLRB 629 (1962); *Penn Color, Inc.*, 249 NLRB 1117(1980); *Hegins Corp.*, 255 NLRB 160 (1981). The factors which the Board examines in making this determination include: past bargaining history; geographical location of the facilities in relation to each other; extent of interchange of employees; work contacts existing among the several groups of employees; extent of functional integration of operations; degree of centralized versus local control over daily operations and labor relations; and the differences, if any, in the skills and functions of employees. *Id* at 42, citing *Sol’s*, 272 NLRB 621(1984). These factors must be weighed in resolving the unit contentions of the parties. The

burden is on the party opposing a petitioned for single facility unit to present evidence sufficient to overcome the presumption. *J & L Plate*, above at 429.

Based upon a review of the record and on the basis of the following, I find that the Employer has failed to present evidence sufficient to overcome the presumption in favor of a single facility unit.

While geographical separation is not necessarily conclusive, it is a strong indicator that a single location unit is appropriate. *Dixie Bille Mills*, above; *Van Lear Equipment, Inc.*, 336 NLRB 1059(2001). Here the locations are a minimum of 15 and a maximum of 25 miles apart. More significant than the geographical distance is the lack of commonality of the job functions themselves. The retail stores sell directly to customers. The warehouse employees pick, pack and ship orders. The store employees are directly supervised by each store manager; the warehouse employees are supervised by Gary Kozel and Rudy Fernandes, located at the Edison facility. Nor are the stores and the warehouse so interdependent and functionally integrated that a broader unit is required. *Southern California Water Company*, 228 NLRB 1296, 1297 (1977). The warehouse could continue to pack, label and ship without either of the two stores the Employer seeks to include, although the stores may be dependent on the warehouse to maintain sales.

I also find a virtual lack of employee interchange between the stores and the warehouse. The only record evidence of any interchange is at Christmas when some warehouse employees will go to the Lexington Avenue store to gift wrap, a function they usually perform in the warehouse. While there were one or two examples of employee movement between the warehouse and the clerical area, the record is

devoid of evidence of warehouse employees moving to the stores and vice versa. The party opposing the single facility presumption has the burden of presenting sufficient evidence to rebut that presumption and can do so by establishing the context and percentage of interchange among the total number of employees. See *New Britain Transportation*, 330 NLRB 397 (1999). In the instant matter the Employer's evidence as to employee interchange is insufficient to meet its burden.

Thus the geographical distance, separate supervision, different skills and job duties that under most circumstances do not impact the other, lack of interchange between the warehouse and the stores, no significant history of transfers, and no bargaining history all militate against the Employer's position and I, therefore, will direct an election in the petitioned for single location unit of all full-time and part-time warehouse employees.

Cases cited by the Employer are inapposite to the instant case. In *Avon Products, Inc.*, 250 NLRB 1779 (1980), the Employer manufactured as well as distributed product. All of the employees worked the same hours; all were salaried although all were converted to hourly wages rates for overtime purposes; all employees shared the same cafeteria and rest area and the Employer presented evidence of hundreds of interchanges among employees, some on a daily and even hourly basis, through an extensive facility-wide bidding program.

Scholastic Magazine, Inc., 192 NLRB 461 (1971) concerned employees whose skills were substantially the same between warehouse employees and the other employees. The general title for all job classification was clerk. Unlike the instant case, in *Scholastic* the minimum and maximum pay rates were the same for all

employees, all employees punched time clocks, used the same cafeteria, worked the same hours and vacancies were filled from warehouse personnel.

The Board held in *Budget Rent-a-Car System, Inc.*, 337 NLRB 884 (2002) that among other things, the employees were functionally integrated because they traveled from one location to another to perform their job duties at each of the locations, not the case here where each employees job duties are performed in discrete areas. In *Neodato Product/Distribution, Inc.*, 312 NLRB 987 (1993) the Board found that the skills and functions performed by employees at the two locations were virtually the same and that employees were able to transfer from one facility to another by bidding on jobs that were posted at both facilities. There is no such evidence in the instant case. *Globe Furniture Rentals Inc.*, 298 NLRB 288 (1990) shows substantial employee interchange with 77 transfers from one facility to another occurring within less than 18 months. Nor do *Eastman West*, 273 NLRB 610 (1984) and *Barbara George, Inc.*, 273 NLRB 1239 (1984) support the Employer's position. In *Eastman*, sales personnel did warehouse work as needed, there was evidence of transfers, both permanent and temporary among the employees and it was the Employer's stated intention to use the warehouse as a training ground for sales positions. *Barbara George, Inc.* shows significant cross-training of employees and work assignment for varying lengths as well as transfers among the employees and frequent telephone contact. In the instant case, the cross-trainings of warehouse employees is in warehouse functions only and the fact that they need a high school diploma to move beyond the warehouse location is restrictive. Moreover, there is no record evidence that telephone contact is with the warehouse unit employees as opposed to the two

supervisors and no evidence as to how often clerical employees who enter the warehouse have contact with unit employees as opposed to supervisors. Thus, I find no basis to reach any conclusion other than that a single facility warehouse unit is appropriate in this matter.

IV. DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the Regional Director among the employees in the unit found appropriate at the time and place set forth in the notices of election to be issued subsequently subject to the Board's Rules and Regulations. Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during the period because they were ill, on vacation or temporarily laid off. Employees engaged in an economic strike who have retained their status as strikers and have been permanently replaced are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike that have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible to

vote shall vote whether or not they desire to be represented for collective bargaining purposes by the **United Steel Workers, AFL-CIO, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union.**

V. LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, two (2) copies of an election eligibility list containing the full name and addresses of all the eligible voters in the unit found appropriate above shall be filed by the Employer with the undersigned, who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB 359 (1994), In order to be timely filed, such list must be received in NLRB Region 22, 20 Washington Place, Fifth Floor, Newark, New Jersey 07102, on or before **June 22, 2006**. No extension of time to file this list shall be granted except in extraordinary circumstances, not shall the filing of a request for review operate to stay the requirement here imposed.

VI. RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations

Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. The Board in Washington must receive this request by **June 29, 2006**.

Signed at Newark, New Jersey this 15th day of June 2006.

/s/ J. Michael Lightner

J. Michael Lightner, Acting Regional Director
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